No. 637

Office - Supreme Court,
FILED
MAR 15 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

347
VAL-
52

No. A-11.

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND SUPPORTING BRIEF.

LOUIS G. MORTEN,
Attorney for Petitioner,
26 Journal Square,
Jersey City, N. J.

SUBJECT INDEX OF MATTER IN PETITION.

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
SUMMARY AND STATEMENT OF THE MATTER INVOLVED	3
BASIS UPON WHICH THIS COURT HAS JURISDICTION	6
THE QUESTIONS PRESENTED	7
REASONS RELIED ON FOR ALLOWANCE OF WRIT	7
Reference to United States Constitution, 14th Amendment, Sec. 1	2, 5
Reference to United States Statute, U. S. C. Title 28, sec. 1257 and 2101	6
Reference to New Jersey Statutes, P. L. 1900, C. 53, sec. 1	3
1922, C. 226, p. 391	3
R. S. 18:6-24	7
Revised Statutes of New Jersey, 18:5-25 and 26	4
Rule of New Jersey Supreme Court, 1:9-4	16

AUG 10 1955

217401

SUBJECT INDEX OF MATTERS IN BRIEF.

PAGE

I. The Federal claim made by the petitioner was timely under the circumstances of this case..... 11

II. The United States Supreme Court has not heretofore determined whether or not, in view of the 14th Amendment to the United States Constitution, title in fee simple absolute can be acquired to property by the exercise of the right of eminent domain supplemented by legislative acts 18

III. The United States Supreme Court has not heretofore determined whether or not, where the estate to be taken under eminent domain proceedings is not expressly defined, and an easement is sufficient for the purpose, no greater estate can be taken..... 21

IV. The Supreme Court of New Jersey has, in this case, decided a Federal question in a way not in accord with the applicable decisions of this Court 22

V. 23

CONCLUSION 24

APPENDIX.

Excerpt from Rules of the Supreme Court of New Jersey 1a

CITATIONS.

	PAGE
United States Constitution, Article 14, Sec. 1 Amendments	8, 9, 10, 17, 20
United States Supreme Court:	
Brinkerhoff v. *Hill*, 281 U. S. 673, 676	16
Fiske v. *Kansas*, 274 U. S. 380, 385	17
Missouri v. *Gehner*, 281 U. S. 313, 320	13, 14
Saunders v. *Shaw*, 244 U. S. 317, 320	15
Wilkinson v. *Leland*, 2 Peters 627, 655, 657, 658	10, 19, 20, 23
Federal District Court:	
Superior Oil Co. v. *Harsh*, 39 Fed. Sup. 467	21, 22
New Jersey Courts:	
Frelinghuysen v. *State Highway Commission*, 107 N. J. L. 218	11, 13, 14, 18
Summerill v. *Hunt*, 55 Atl. 2d 833	12, 13, 14
New Jersey Public Laws:	
1922, Ch. 226, p. 391 (School Act)	12
1926, C. 96, p. 152 (State Highway Act)	11
1927, C. 319, Sec. 111 e, p. 725	11
1929, C. 333, p. 754	12
1935, C. 178, p. 440	12
Revised Statutes of New Jersey:	
18:6-24 (School Act)	12
27:7-22 (Highway Act)	11
27:12	11
New Jersey Supreme Court, Rule 1:9-4	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Petitioner prays that a writ of certiorari issue out of this court to review:

(1) The judgment of the Supreme Court of the State of New Jersey, filed in the above entitled action on November 23, 1953 (R. 87); which judgment affirmed the judgment of the Superior Court, Appellate Division (R. 87); the judgment of the Appellate Division affirmed the judgment of the Law Division of said Court (R. 76); the judgment

---

(In referring to that part of the record contained in the Joint Appendix the letter "a" is omitted, only the number of the page being used.

In referring to pages contained in the petition for rehearing, (pages 88 to 101, inclusive) the re-numbering is used instead of the numbers originally printed.)

of said Law Division, among other things, ordered and adjudged "that the Board of Education of the City of Jersey City, Hudson County, New Jersey, a body corporate, acquired a title of fee simple absolute in said premises No. 15 Dick Street, Jersey City, New Jersey (R. 57 and 58); * * * that said fee simple absolute * * * was acquired in condemnation award which issued out of condemnation proceedings filed in Hudson County Circuit Court on July 19, 1922" (R. 58).

"And * * * that complaint in the foregoing action for ejectment be and it is hereby dismissed" (R. 58).

In affirming this judgment the Supreme Court of New Jersey unexpectedly overruled all previous applicable decisions of courts in that State.

(2) Also to review the order filed in said Supreme Court of New Jersey on December 21, 1953 (R. 102), which denied the petition filed in said Supreme Court by the petitioner herein, seeking a rehearing of the appeal of the petitioner, upon which appeal the judgment had been entered in said last mentioned court on November 23, 1953 (R. 87), as aforesaid, said petition for rehearing alleging that the judgment of the said Supreme Court deprived petitioner of property without due process of law and contravened Article 14, Section 1 of the amendments to the Constitution of the United States.

Opinions Below.

The opinion of the New Jersey Superior Court, Law Division, will be found on page 42 of the record and is reported in 20 N. J. Superior, 454.

The opinion of the Appellate Division will be found on page 59 of the record and is reported in 25 New Jersey Superior 342.

The opinion of the New Jersey Supreme Court will be found on page 78 of the record and is reported in 100 Atlantic 2d 668.

I.

Summary and Statement of Matter Involved.

Public laws 1922, chapter 226, page 391 of New Jersey, which became effective on March 13, 1922, prescribed certain powers of the Board of Education created under the act to establish a thorough and efficient system of free public schools in New Jersey approved October 19, 1903.

The act of 1922 amended section 47 of the act of 1903 and it provided as follows:

> "47. Such board shall • • • have power to • • • purchase, lease, receive, hold and sell property, real and personal, take and condemn land and other property for school purposes in the manner provided by law regulating the ascertainment and payment of compensation for property condemned or taken for public use."

The law regulating the ascertainment of payment of compensation for property condemned or taken for public use is generally referred to as the Eminent Domain Act, which prescribed the method by which, among others, a municipal corporation could take land and other property for public use and this law was in effect in July, 1922 (P. L. 1900, c. 53, sec. 1).

In July, 1922 the Board of Education of the City of Jersey City instituted proceedings to take and condemn certain lands in said City (R. 1, 2) then owned by Emma Maslin (R. 1) who was the condemnee and plaintiff is a successor in interest of said condemnee (R. 5).

As a result of such proceedings, said Board of Education took and acquired title to said lands under the provisions of said acts (R. 2), but said lands were never used for school purposes (R. 3, 4, 8, 25).

On March 14, 1946, said Board of Education held a public sale of such lands (R. 3) to comply with R. S. 1937 of State of New Jersey 18:5-25 and 18:5-26 providing for the sale of school properties not deemed necessary for school purposes (R. 3).

These facts are admitted by adverse parties (R. 8, 14, 25).

In one of its defenses the Board avers:

> "The defendant in making this conveyance to Lester Lamont and Marion Lamont, his wife, relies on R. S. 18:5-25 and 18:5-26" &c. (R. 27).

This reference is to the Revised Statutes of New Jersey (1937), Title 18, Chapter 5, and reads as follows:

18:5-25:

> "A board of education may sell or dispose of any of its real estate, or rights or interests therein, which cease to be suitable or convenient for the use for which they were acquired or which are no longer needed for school purposes, whether such real estate or rights or interests were acquired by purchase or through condemnation proceedings. The purchaser shall acquire title to the property so sold free from any use or purpose for which it may have been acquired by the board."

18:5-26, provides for public or private sale.

In January, 1952, the petitioner, alleging that she had a right to enter the premises by reason of abandonment of property for school purposes, instituted an action in ejectment in the Superior Court of New Jersey, Law Division,

against the grantees named in said deed, Lester Lamont and wife, to recover possession of said lands.

On March 19, 1952, on their motion, the Board of Education aforesaid was added as a Third Party Defendant in said action (R. 17).

And on March 20th 1952, Anthony J. Lamont, as mortgagee of said grantees, applied for and was given leave to and did intervene in said action (R. 18).

On June 30, 1952, the Trial Court disposed of plaintiff's claim of a reverter (R. 57-58) by adjudging that:

> "The Board of Education of the City of Jersey City, Hudson County, New Jersey, a body corporate, acquired a title of fee simple absolute in said premises No. 15 Dick Street, Jersey City, New Jersey."
>
> "And it is further ordered and adjudged, that said fee simple absolute to No. 15 Dick Street, Jersey City, was acquired in condemnation award which issued out of condemnation proceedings filed in Hudson County Circuit Court on July 19, 1922."

On April 13, 1953, the Appellate Division affirmed the judgment of the Trial Court (R. 76).

On November 23, 1953, the Supreme Court of New Jersey affirmed the judgment of the Appellate Division (R. 87).

Within the time allowed by the rules of said Supreme Court and on December 2nd, 1953, a petition for rehearing was filed by the petitioner herein for a rehearing (R. 88) alleging specifically that the judgment from which she had appealed contravened the 14th Amendment because the effect of the judgment was to deprive her of her property without due process of law (R. 91).

On December 21, 1953, said Supreme Court denied said petition for rehearing (R. 102).

And now, on March 15, 1954 plaintiff in said action presents this petition to this court for a writ of certiorari to review the judgment of said Supreme Court of New Jersey and the order made by said court denying said petition for rehearing filed on December 21, 1953 as aforesaid.

II.

Basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

The petitioner contends that this court has jurisdiction to review the judgment in question under the provisions of

U. S. C., Title 28, sections 1257 and 2101 62 Stat. 929 and 63 Stat. 104.

The grounds upon which it is contended the questions involved are substantial are that the judgment of the Supreme Court of New Jersey (R. 87) in this action is repugnant to the 14th Amendment to the United States Constitution.

And the order made herein by said court on December 21, 1953, denying the petition of the petitioner herein for a rehearing (R. 102) is likewise repugnant to said 14th Amendment.

The Federal questions sought to be reviewed were first raised in the Supreme Court of New Jersey, when that court, unexpectedly, overruled previous decisions recognized as the law in New Jersey previous to this action; the method of raising them was by petition for rehearing in that court (R. 88); the way in which they were passed upon by that court was by the entry of an order that the petition be denied (R. 102).

The petitioner was not granted a hearing upon her petition for rehearing because no justice who voted with the majority moved for a reconsideration (R. 102).

Questions Presented.

1. Under the applicable statutes of the State of New Jersey, can a condemnor exercising the right of Eminent Domain acquire thereby a fee simple absolute title to private property condemned for school purposes?

2. Is the effect of the order made by the Supreme Court of New Jersey on December 21, 1953, aforesaid (R. 102) to deprive petitioner of property without due process of law?

3. Is the construction placed by the New Jersey Supreme Court upon the statute, R. S. 18:6-24, holding that "the Legislature intended that a fee simple absolute title should be taken by eminent domain for school purposes" (86) repugnant to the 14th Amendment.

Reasons Relied on for Allowance of Writ.

(1) The Supreme Court of the State of New Jersey has, in this case, decided a federal question of substance not heretofore determined by this Court, namely, that under the statutes of New Jersey

> "* * * the Board of Education in this case took a fee simple title in the premises in question * * * and was authorized by the said statutes to convey a fee simple absolute title * * *" (R. 86).

The Federal question of substance involved is whether or not said Supreme Court, by its determination that such

statutes authorize the Board as such condemnor, to acquire thereunder a title in fee simple absolute, has not placed a construction upon such statutes that is repugnant to Article XIV, section 1, of the Amendments to the United States Constitution, which provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(2) The Supreme Court of the State of New Jersey, has in this case, decided a Federal question in a way probably not in accord with the applicable decisions of this Court, namely:

This Court has held that the property of A cannot be transferred without his consent to B, by a legislative act.

Applying this rule to a condemnor, it necessarily follows that the property of A cannot be transferred, without his consent, to B, by a condemnor, who, exercising the right to acquire private property by eminent domain for public use, acquires the property of A and then subsequently conveys such property to B.

(3) There are special and important reasons why this writ should be granted.

On the one hand we have this Court declaring that the private property of A cannot be taken from him, without his consent, and given to B, by legislative action.

This certainly includes the adjudication that, either with or without compensation, the private property of A cannot be taken from him, without his consent, and given to B, for his private use, by legislative action.

On the other hand, we have decisions by State courts, adjudging that where the language of the statute involved is sufficient to disclose an intent on the part of the legislature that a condemnor should acquire a fee simple abso-

lute title to the property that was being taken and condemned, the fee simple absolute title does pass to the condemnor.

However, in all these cases the question considered and decided by the court was whether or not the language of the statute was sufficient to provide that a fee simple absolute title was to be acquired by the condemnor.

In no case was any question raised, considered or decided as to whether or not, when such a construction was placed upon the statute, it contravened the "due process of law" clause of the 14th Amendment.

When any State statute is so construed as to provide that a condemnor can acquire a fee simple absolute title to property, it is tantamount to an adjudication that, by State legislative action, to wit, condemnation proceedings, the private property of A can be taken from him, without his consent, upon the allegation that it is to be taken for public use and the condemnor, by complying with the statute, will acquire a fee simple absolute title to such property.

And once it is conceded that the condemnor has acquired a fee simple absolute title thereto it cannot be gainsaid that the condemnor has lawful authority to convey such property to any private person whomsoever for any private use whatever.

Thus, unless this Court shall hold that, where the protection of the Federal constitution is invoked, these decisions of these State courts are repugnant to the "due process of law" clause of the 14th Amendment, and must yield, we have, in the case at bar, a perfect illustration of how the property of A can be taken from him, without his consent, and given to B by legislative action, without limitation as to subsequent conveyance and uses.

In the case at bar the constitutional question has been raised as to whether or not State legislation providing that a fee simple absolute title to property can be acquired by a condemnor in condemnation proceedings violates the "due process of law" clause contained in the 14th Amendment.

If it is to be held that the decision of this court in *Wilkinson* v. *Leland, infra,* is still the law, then although the State court decisions may be sound insofar as they hold that the language of the State Statute itself is sufficient to provide that a fee simple absolute title may be acquired by condemnation proceedings, yet such a statute violates the due process clause of the 14th Amendment aforesaid and, therefore, such a statute is unconstitutional and void in this respect, if the constitutional question is raised.

This Court is the final arbiter upon this question. It affects the rights of every property owner in the nation and, therefore, in order that it may be determined, this writ should be allowed.

SUPPORTING BRIEF.

I.

The Federal claim made by the petitioner was timely under the circumstances of this case.

In 1930 the then New Jersey Supreme Court held that the power granted to the New Jersey State Highway Commission to sell lands or real estate which came "into its possession or control, * * * must be limited to such lands as to which it has acquired a fee by deed, gift, grant, or other lawful transfer from the owner. It was not intended to apply to 'rights of way' acquired by condemnation."

> *Frelinghuysen* v. *State Highway Commission,* 107 N. J. L. 218, 223; affirmed by the then highest State Court in 108 N. J. L. 403.

The statute considered in the *Frelinghuysen* case which granted to the Commission the right to acquire property by condemnation (P. L. 1927, c. 319, section 111 e), was re-enacted in the Revised Statutes of 1937.

And for the purpose of this inquiry the language may be considered as identical. It is there known as R. S. 27:7-22, and will be found on page 97 of the record.

The statute granting the Commission the right to sell lands acquired when they are no longer required by the Commission for use (P. L. 1926, c. 96), was re-enacted in the Revised Statutes of 1937.

And for the purpose of this inquiry the language may be considered as identical, at least so far as the power of sale is concerned. It is there known as R. S. 27:12 and will be found on page 97 of the record.

By P. L. 1935, c. 178, p. 440, the office of State Highway Commissioner was created and he succeeded to the powers and duties of the then State Highway Commission, and by section 3, p. 441, the State Highway Commission was abolished.

The statute under which the Board of Education was granted the right to acquire the lands in this case by condemnation (P. L. 1922, c. 226, p. 391) was re-enacted in the Revised Statutes of 1937.

And for the purpose of this inquiry the language may be considered as identical, at least so far as the power to acquire and the power to sell are concerned. It is there known as R. S. 18:6-24, and will be found on page 96 of the record.

Apparently some question must have arisen as to the sufficiency of these laws to enable the Board to sell lands acquired by condemnation and accordingly in 1929 the legislature passed an act (P. L. 1929, c. 333, p. 754) granting power to the Board of Education to

> "sell • • • lands • • • which • • • are no longer needed for school purposes, whether • • • acquired • • • by purchase or through condemnation proceedings for school purposes."

But this latter act could not in any way affect the rights of Emma Maslin, the condemnee, as they existed at and after the condemnation in 1922, nor could it affect the rights of those claiming under her, of whom petitioner is one (R. 33).

In 1947 the Circuit Court of New Jersey (not the highest court), had held (*Summerill* v. *Hunt*, 55 Atl. 2d 833):

> "The primary question for determination relates to the quality of the estate in the lands in question which was acquired • • • pursuant to the condemnation proceedings" (835).

"If, on the other hand, the traction company did not acquire such an estate," (an estate in fee simple absolute) "but only a qualified or conditional estate dependent upon a continuing use * * * and if such use has been abandoned, then * * * there will be a reversion of title to the owner, or his successor in title, the plaintiff, whose lands were taken by condemnation" (*Ibid*).

"Had the Legislature provided especially for the acquisition of title in fee simple absolute by condemnation, the question would at once arise as to the constitutionality of the act."

"It appears to be the settled law that a fee simple absolute cannot be acquired by condemnation" (837).

These two decisions were the recognized law in the State of New Jersey until the decision in the case at bar, and the petitioner in this court was justified in assuming that the highest court would follow the law as laid down in previous decisions.

In the present case, the now highest court of the State of New Jersey has departed from the previous law, and has expressly overruled the *Summerill* v. *Hunt* case (R. 86).

And, without comment, it did not follow the decision in the *Frelinghuysen* case, *supra,* which held that a condemnor could not sell lands which had been acquired by condemnation for public use (see p. 11, *supra*).

Under such circumstances this Court has upheld the right of a litigant to a review of any Federal questions involved.

The case of *Missouri, &c.* v. *Gehner,* 281 U. S. 313, 320, presents a situation identical in principle with the present case but the facts in that case were not quite so favorable to the right to the relief sought.

In the *Missouri* case the applicant for relief in this Court did not have a decision of a state court upholding its contention.

In the case at bar there were decisions, one in the highest State court which held that a condemnor could not sell lands which had been acquired by condemnation for public use.

Frelinghuysen case, *supra.*

And, of course, if such a condemnor could not sell, it necessarily follows that it did not acquire nor could it convey a fee simple absolute title to such lands.

And there was also a decision by a trial court holding that a fee simple absolute title cannot be acquired by condemnation.

Summerill case, *supra.*

In the *Missouri* case there had been no previous court decision. It was a first construction of a State statute.

In the *Missouri* case, this Court said (p. 320):

> "It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke Federal protection * * *."

How much more so was the petitioner in this case relieved from the necessity of anticipating that existing law would be overruled; or, in advance, invoking Federal protection, when she had decisions of the State courts in her favor!

In that case, this Court also said (p. 320):

> "Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the state the Federal questions here presented and is entitled to have them considered."

There the appellant had filed in the highest court a petition for rehearing wherein the Federal questions were first raised.

Just so, the petitioner in this case sufficiently raised in the highest court in New Jersey the Federal questions here presented by her petition for rehearing.

In that case this Court also said (p. 320):

> "But here, the company at the first opportunity invoked the protection of the Federal Constitution and Statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States."

Just so, the petitioner in this case, at the first opportunity, invoked the protection of the Federal Constitution.

Invoking such protection from the inferior tribunals would have been to no avail as an adverse decision on their part could not be brought to this Court for review.

It was incumbent upon the petitioner in this Court to first obtain a decision of the highest court in the State before she could seek relief in this Court.

This she did by her appeal to that court, and its decision, coming unexpectedly, in view of the previous decisions hereinbefore referred to, left her no alternative other than to file a petition for rehearing in which she raised the Federal questions involved, and when that court denied her petition, she thus became a party aggrieved in such a way that she has a right to come to this Court.

In the case of *Saunders* v. *Shaw*, 244 U. S. 317, 320, this Court said:

> "But when the act complained of is the act of the supreme court" (State) "done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a

serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way cannot come here."

In *Brinkerhoff &c.* v. *Hill,* 281 U. S. 673, this Court said:

"The powers and duties of the state tax commission are prescribed by article 4 of chapter 119 of the Revised Statutes of 1919. Six years before this suit was begun those provisions had been construed by the Supreme Court of Missouri, in Laclede &c. *v.* State Tax Commission, 295 Mo. 298, 243 S. W. 887" (676).

* * * * * *

"No one doubted the authority of the Laclede Land & Improv. Co. case until it was expressly overruled in the case at bar" (677).

* * * * * *

"The plaintiff seasonably filed a petition for a rehearing in which it * * * asserted * * * that in applying the new construction of Article 4 of chapter 119 to the case at bar and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional Federal claim thus was timely since it was raised at the first opportunity" (677).

Just so, the decision of the Supreme Court of New Jersey, in the case at bar, overruled previous decisions which were recognized as authority.

The petitioner herein seasonably filed a petition for rehearing, (within the ten days allowed by rule 1:9-4 of the Supreme Court of New Jersey (see Appendix, p. 1a, *infra*) asserting that it contravened the due process clause of the 14th Amendment.

Therefore, the Federal claim thus made was timely.

The decision in this case by the Supreme Court of New Jersey is reviewable by this court because it applies state

statutes as to which there was insistence that if so applied the statutes were void under the Federal Constitution (R. 91).

In *Fiske* v. *Kansas,* 274 U. S. 380, 385, this Court said:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore reviewable" &c.

The facts in this case amply disclose that the petitioner has never had an opportunity to be heard upon her insistence that she has been deprived of her property without due process of law by the decision in this case of the highest court in New Jersey.

Therefore, when the Supreme Court of New Jersey denied her petition for rehearing, it denied her the right to be heard upon her Federal claim in this case and she has been deprived of property without due process of law in violation of the provisions of the 14th Amendment [Article XIV, Section 1 of the Amendments to the United States Constitution].

II.

The United States Supreme Court has not heretofore determined whether or not, in view of the 14th Amendment to the United States Constitution, title in fee simple absolute can be acquired to property by the exercise of the right of eminent domain supplemented by legislative acts.

Whether or not the "due process of law" clause in the 14th Amendment to the United States Constitution bars a condemnor from acquiring a title to private property in fee simple absolute merely by the exercise of the right of eminent domain, supplemented by Legislative Acts, is a Federal question of substance not heretofore determined by this Court.

Diligent search has failed to reveal any such decision and neither the New Jersey courts, in their decisions in this case, nor the attorneys for the adverse parties herein have cited or referred to any such case.

On the contrary, the decisions of the New Jersey courts, prior to this case, have held that title in fee simple absolute could not be thus acquired.

(*Summerill* and *Frelinghuysen* cases, *supra.*)

In her petition for rehearing, the petitioner raised this question before the Supreme Court of New Jersey but that court dismissed the petition without any comment or decision of any kind upon the question so presented, and merely entered an order that the petition for rehearing be denied (R. 102).

However, a case was found in which this court considered the power of the legislature of Rhode Island to

ratify and confirm a title to land in that state, based upon a license granted to an executrix in the State of New Hampshire, to sell lands of the deceased testator to pay his debts, and such power was denied.

Wilkinson v. *Leland,* 2 Peters 627, 655 and 657-658, 7 L. Ed. 542, 552 and 553.

Page 552:

"The sale, therefore, made by the executrix • • • in virtue of the said license was utterly void; and the deed given thereupon was, *proprio vigore,* inoperative to pass any title of the testator to any lands described therein."

"The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them —a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In Terrett *v.* Taylor, (9 Cranch. 43), it was held by this court that a grant or title to lands once made by the Legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republic government, and with the right of the citizens to the free enjoyment of their property lawfully acquired.

"We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union.

> "On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

It would seem to necessarily follow that if a State could not transfer directly to a private person (other than the condemnee or those claiming under her) the title of the condemnee to the lands in question, it could not authorize, by legislative action, such transfer to be made by a condemnor who had acquired title thereto by Eminent Domain proceedings.

It cannot be successfully denied that the Supreme Court of New Jersey, by its judgment in this case, adjudging that, under the provisions of the statute granting to the condemnor the right to exercise the power of Eminent Domain, the condemnor acquired, without the consent of the condemnee, Emma Maslin, a fee simple absolute title to her property described in the complaint in this action, involves exactly the same principles that this court considered in the *Wilkinson* case, *supra.*

In that case, at page 658, this Court said:

> "We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their Legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine."

Therefore, the petitioner has, by the judgment of the Supreme Court of New Jersey in this case, been deprived of property without due process of law, in violation of the provisions of Article XIV, Section 1, of the Amendments to the United States Constitution.

III.

The United States Supreme Court has not heretofore determined whether or not, where the estate to be taken under eminent domain proceedings is not expressly defined, and an easement is sufficient for the purpose, no greater estate can be taken.

Whether or not the "due process of law" clause in the 14th Amendment aforesaid bars a condemnor from acquiring any greater estate than is necessary to be taken for the purpose for which the property is being taken is a Federal question of substance not heretofore determined by this Court.

But both subordinate Federal and State courts have recognized the rule to be that the extent of the estate which may be taken, where it is not expressly defined, is no greater than is necessary for the public use to be served.

> *Superior Oil Co.* v. *Harsh,* 39 Fed. Sup. 467, U. S. Dist. Ct. (1941).

At page 471 (quoting from *Miller* v. *Commissioners,* 116 N. E. 178, 181, Ill. Sup. Ct. 1917):

> "Where the estate to be taken is not expressly defined, only such an estate will vest as is necessary to accomplish the purpose in view, and where an easement is sufficient for that purpose no greater estate can be taken."
>
> "The grant of power to take the land of an individual by the exercise of eminent domain is strictly construed and the extent of the estate which may be taken is no greater than is necessary for the public use to be served."

In the *Superior Oil* case, the Court further said at page 470:

> "The title of the school trustees was the statutory title granted by the legislature, title by acts of eminent domain, a taking with consent of the owner for the use of the inhabitants of the township for school purposes."
>
> "There is no evidence that the school trustee procured any other kind of title, or that they ever made any claim to any other kind of title, and, under the statute, they could by their acts obtain only such title as was necessary for the statutory purposes, that is, conduct of a school."

And on page 471:

> "Their title was merely to use the property for school purposes; there is no justification for its extension by implication."

If this Court shall also rule that this test is the true rule by which the extent of the estate to be taken is to be determined, then the adjudication by the Supreme Court of New Jersey, that in the case at bar, the Board of Education, the condemnor took an estate in fee simple absolute, is repugnant to the "due process of law" clause and should be reversed.

IV.

The Supreme Court of New Jersey has, in this case, decided a Federal question in a way not in accord with the applicable decisions of this Court.

This Court has not heretofore determined, in so many words, that title in fee simple absolute cannot be acquired by condemnation proceedings.

But it has held that a legislative act to transfer the property of A to B is not a constitutional exercise of legislative power.

Wilkinson v. *Leland*, 2 Peters 627, 658 (see quotation under Point II of this brief).

The judgment of the Supreme Court of New Jersey holding that a title in fee simple absolute was acquired by the Board of Education, the condemnor, by virtue of the proceedings under the Eminent Domain Act, referred to in the complaint herein, is exactly the same in principle as holding that title to the private property of A can be transferred to B by legislative act.

Whether it be done by a special legislative act or by a general legislative act is immaterial to the present inquiry, as is also the question as to whether it is with or without compensation.

The transfer of title, either by special legislative or general legislative act, is equally repugnant to the "due process of law" clause of the 14th Amendment.

Therefore, petitioner contends that the Supreme Court of New Jersey has, in this case, decided a Federal question in a way probably not in accord with the applicable decisions of this Court.

V.

The petitioner has set forth in the third reason relied on for the allowance of the writ in this case her argument in support of her contention that there are special and important reasons for the allowance of the writ.

The argument that the present state of the law requires the decision of this Court to determine the doubt and uncertainty that now prevails concerning the questions presented in this third reason seems to be unanswerable.

And that reason, in itself, is most persuasive that the writ as sought herein should be granted.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari herein should be granted.

Louis G. Morten,
Attorney for Petitioner,
26 Journal Square,
Jersey City, N. J.

Appendix.

Excerpt from Rules of the Supreme Court of New Jersey.

"1:9-4. Petition for Rehearing.

(a) Within 10 days after judgment is entered, unless the time is enlarged by the order of the court, a party may apply for a rehearing by filing 12 copies of a petition with the court, * * *."

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF FACTS 1

ARGUMENT OF LAW:

POINT ONE—Construction to be placed on R.S. 18:6-24 and R.S. 18:5-25 3

POINT TWO—A title in fee simple absolute can be acquired by eminent domain 4

POINT THREE—The taking of private property for private use is not permitted under the U. S. Constitution 7

THE THREE DECISIONS BELOW ARE CLEARLY CORRECT .. 9

THERE IS NO CONFLICT OF DECISION 9

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW ... 9

CONCLUSION 9

Cases Cited

Behnke v. New Jersey Highway Authority, 25 N. J. Super. 149 8

Bentley v. Newark, 108 N. J. L. 317 6

Carroll v. Newark, 108 N. J. L. 323 6

Erie R. R. Co. v. Tompkins, 304 U. S. 64 3

Fox v. Snow, 6 N. J. 12 (1950) 3

Midler v. Heinowitz, 10 N. J. 123 (Sup. Ct., 1952) 4

PAGE

Summerill v. Hunt, 25 N. J. Misc. 498 (1947) 4

State v. U. S. Steel Corp., 12 N. J. 38 8

The Texas Pipe Line Co. v. Snelbaker, 30 N. J. Super. 171 (March 8, 1954) 8

Statutes Cited

N.J.R.S. 18:5-25 .....1, 2, 3

N.J.R.S. 18:6 3

N.J.R.S. 18:6-24 ..... 3, 6

Miscellaneous

Newark Evening News, July 3, 1953 5

IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 637

ALTA VALENTINE,

Petitioner,

vs.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

Counter-Statement of Facts

The writer feels that the facts stripped of all legal conclusions are rather fully covered in the pleadings, and therefore the writer will make a succinct statement:

1. Emma Maslin owned 15 Dick Street in 1922.

2. That in 1922, following condemnation proceedings instituted by Board of Education, for the express purpose of enlarging Public School No. 11, the said Emma Maslin was awarded, and in fact paid the sum of $13,600 in 1922, which sum she retained.

3. That the Board of Education, in 1946, pursuant to statute, publicly advertised and sold at public auction the premises 15 Dick Street to the defendants Lester and Marion Lamont for the sum of $5,900, pursuant to R.S. 18:5-25.

4. That the said defendants Lester and Marion Lamont occupied and still occupy the said premises and paid all of the taxes, water rents, insurance and maintenance from 1946 to date.

5. That the title of these defendants and that of the Board of Education was never questioned until the filing of the present suit for ejectment of January 11, 1952.

6. That the Board of Education, in good faith, indicated openly its proprietary interest as confirmed by payment of taxes, water rents, insurance, maintenance and repair, and the collection of rents from the occupants of each of the houses acquired in the condemnation proceedings of 1922, down to the public sale at public auction of the said premises in 1946, pursuant to R.S. 18:5-25.

7. The plaintiff refuses to reimburse the defendant Board of Education for the $13,600 paid in the 1922 condemnation proceedings together with the taxes, insurance, water rents, repair and maintenance from 1922 to 1946, and plaintiff also refuses to pay Lamont *et ux.*

8. That Emma Maslin died intestate, a widow, on May 27, 1928, leaving her surviving as her only heir at law, Mary L. Stinard.

9. That Mary L. Stinard died intestate, on January 22, 1934, leaving her surviving as her only heirs at law, Percy L. Stinard, a son; address unknown, Alta Valentine, the sole plaintiff, a granddaughter; and Rutherford L. Stinard, a grandson, who now resides in New York State.

ARGUMENT OF LAW

POINT ONE

Construction to be placed on R.S. 18:6-24 and R.S. 18:5-25.

The writer will confine himself to the interest of the defendants, Lester and Marion Lamont, as to the defense, counterclaim and third party complaint.

The writer wishes to avoid needless repetition and analysis of the plaintiff's brief and the cases cited therein, for the simple reason that a reading of said citations will clearly indicate that neither the facts nor the law, in said citations, have any application to the present pending question and suit herein.

The attempted application of the old principle of *"stare decisis"* has in recent years been rejected by United States Supreme Court and most recently in a sparkling dissenting opinion of VANDERBILT, *C. J.*, in *Fox* v. *Snow,* 6 N. J. 12 (1950), at pages 14 and 21 to 28 inclusive.

See also: *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.

Moreover, counsel for the other defendants, have briefed, argued and analyzed in great detail the said plaintiff's citations and have clearly and eloquently demonstrated the inapplicability of same.

The primary title is born out of the authority provided in R.S. 18:6 and R.S. 18:6-24 and entitled "Title to property vested in board" and "Purchase, holding, sale and condemnation of property"; respectively.

There is not a single decision which this writer has been able to find in spite of diligent research, wherein any title acquired by virtue of the above sections was ever determined to be one of a limited fee. A careful reading of our statute, *i.e.,* R.S. 18:6-24, will clearly show that it contains no reference whatsoever as to the limitation of the fee taken therein and thereunder.

POINT TWO

A title in fee simple absolute can be acquired by eminent domain.

The only case cited by the plaintiff to support her contention is that of *Summerill* v. *Hunt*, 25 N. J. Misc. 498, decided by Judge PROCTOR on November 25, 1947, almost one year after the sale of said premises in this litigation by the Board of Education to Lamont *et ux*, in April 1946. The above case concerns itself with a traction matter, and the only possible application or reference to the matter herein is that portion of the opinion which refers to "reverter" and that a fee simple cannot be acquired by condemnation. It is important to point out that what has been referred to herein is at best "mere *obiter dicta*". The aforesaid claim of "*obiter dicta*" applies with the same effect to the other cases cited by the plaintiff for said propositions.

The writer's contention as to "*obiter dicta*" in *Summerill* v. *Hunt*, 25 N. J. Misc. 498, has now been adopted by and specifically noted in their separate opinions (A-56 by Judge SMITH and A-72-73 by Judge GOLDMANN and by Judge OLIPHANT) which expressly overrules as *obiter dicta* in the above case as reported in 13 N. J. 569 at 581.

This brings into direct play and application the "Two Court Rule" followed by our State and United States Supreme Court as appears in *Midler* v. *Heinowitz*, 10 N. J. 123, at page 129 (Sup. Ct., 1952), which held as follows:

> "Ordinarily, after two lower courts have considered the facts and have reached concurrent findings thereon, this court will not have the occasion to make a new and independent finding unless there is such palpable error in the concurrent findings or such clear showing otherwise of a miscarriage of justice as that a new finding by us is necessary to serve the essential ends of justice.

The two court rule has long been followed by United States Supreme Court which will not 'undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' "

The following editorial, appearing in the Newark Evening News of Friday, July 3, 1953, is appropriate at this point:

"MUSHROOMED PROCEDURE

FINDING the Chief Justice of the United States, Fred M. Vinson, a Democrat, and the new Republican Attorney General, Herbert Brownell Jr., of substantially the same opinion should be encouraging to the delegates to the President's Conference on Administrative Procedure. Out of the conference is coming no easy formula, nor can its recommendations, however general, be of quick adaptation, but it will be helpful nevertheless.

Since our own Civil War the Government has greatly expanded, and increasingly so under the impact of two world wars and the results of their aftermath. The consequence has been the creation of almost innumerable commissions, institutions and agencies, each with its own administrational procedure. Out of them has mushroomed a vast body of administrative law subject to court interpretation.

The Chief Justice wants 'cheaper and juster determination of legislation.' He cited 21,000 pages of printed record in a single National Labor Relations Board case, in which the Supreme Court already twice had ruled on the point at issue. Mr. Vinson called it 'excessive documentation.' The layman, who figures these 21,000 pages as the equivalent of 63 novels, will think it monstrous.

Attorney General Brownell pointed out that administrative agencies determine private rights—in effect make the law—'in such important and diverse fields as

transportation, communication, atomic energy, subversive activities, industrial accidents, Indian claims and milk marketing.' Four important boards and commissions in the year ending June 30, 1951, conducted 5,325 hearings, whereas but 9,878 civil and criminal cases were heard by the 215 Federal district judges. The Department of Justice is eager to relieve the burden of this administrative procedure, which President Eisenhower has shown he believes too great."

The cases which more aptly can be compared to fit the application of the facts and law for the standpoint of comparability are found in two decisions of our Court of Errors and Appeals in eloquent opinions, both written by Justice CASE, in *Bentley* v. *Newark*, and *Carroll* v. *Newark*, both reported in 108 N. J. Law at 317 and 323 respectively. Each of the aforesaid cases are fully analyzed in the brief submitted by the Board of Education and adopted by this writer.

The Court is reminded of the fact that our statutes have many separate acts for eminent domain, *i.e.*, specific ones for *"Highways"*; another for *"Railroads"*; still another for *"Canal Companies"*; also separate act for *"Street Railway Companies"*; then an act for *"Telephone Telegraph and Utility Companies"*, and most recent the *"New Jersey Turnpike"*.

The distinguishing feature between some of these acts for eminent domain, such as *"Highways"* and *"Traction Companies"* expressly provide that the fee obtained therein is but a limited use, having in mind that with the change of time *"Highways"* often times may require complete abandonment or a new and complete change of location. The aforesaid limitation and test has never been applied directly or otherwise, where property was acquired by a Board of Education for school use under R.S. 18:6-24. Those charged with the assembling of real estate for future use as to the location of schools to be erected fifteen (15)

and twenty (20) years after the acquisition of the real estate, must necessarily at the date of original acquisition, have a fee simple absolute title to said real estate. The acquisition which is often required many years before the actual building of the school, is dictated by the fact that to delay such acquisition and purchase or condemnation might often work a great injustice upon the officials in charge, not only as to the price of the land, but as to the size of it. This has been demonstrated many times in past where steps were taken to assemble the plot after much of the area has been developed, brings with it the sharp increase in the price of the original plottage with the lesser choice of careful selection of the site. Thus it follows that even where a site has been assembled, many years before the building has been decided upon, developments often arise whereby the original choice of the site with the running of time becomes less choice so that in such an event the school board must in the exercise of good government, proper administration and sound business be free to dispose of such site free of any title questions of actual or possible reverter. This question, of course, will not arise on any condemnation acquisitions after the date of our 1947 constitution, for the said 1947 constitution expressly provides that in all condemnations from 1947 on, the title obtained therein will be one of fee simple absolute.

POINT THREE

The taking of private property for private use is not permitted under the U. S. Constitution.

To permit the plaintiff a judgment would directly violate the 5th amendment of U. S. Constitution which prohibits the taking of private property without due process of law, and would also violate the provisions of our own State Constitution for the same reasons. The plaintiff in Point One of her argument cites the federal constitution in its prohibition against the taking of private property for pri-

vate use. This proposition and the application thereof is of course much broader than would be indicated by the plaintiff's attitude as well as of the exact facts of the title original and supplemental applicable thereto. The defendant urges that the plaintiff by this very action of ejectment attempts to do the very thing which is expressly prohibited by the constitution.

Moreover, questions or allegations that concern themselves with constitutionality of an act, a law, or a statute are such that must be proved by him who asserts the contention.

> See: *Behnke* v. *New Jersey Highway Authority,* 25 N. J. Super. 149, at page 170, wherein the Court stated that legislative enactment should not be invalidated by courts unless it clearly appears that organic law has been violated, and burden of showing such violations rests upon him who asserts it.

And in other recent decision of *State* v. *U. S. Steel Corp.,* 12 N. J. 38, at page 44, the Court stated that the phrase "due process of law" formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of Bill of Rights, and its asserted denial is to be tested not as a matter of rule, but rather by an appraisal of totality of facts involved in particular case.

The Texas Pipe Line Co. v. *Snelbaker,* 30 N. J. Super. 171, decided March 8, 1954.

Proceeding by pipe line company to acquire certain rights in lands of property owners for purpose of constructing a pipe line network for the transportation of petroleum products. The Superior Court Law Division, Gloucester County, held that statute authorizing pipe line company to acquire land by eminent domain for purpose of constructing pipe line network does not violate constitutional rights of property owners where they will be a public benefit from the service rendered by the pipe line company.

The plaintiff attempts by the pending action, to recapture from these defendants, free of any reimbursement, the premises 15 Dick Street, Jersey City, for which the plaintiff did actually accept, collect and retain the sum of $13,600 in 1922. If the courts are to permit such a result to be accomplished, it will not only be in direct violation of the constitutional prohibition but would also serve to effect completely a double payment or satisfaction, together with an unjust enrichment for plaintiff, as against the defendants.

The Three Decisions Below Are Clearly Correct

The written opinions supporting the three decisions rendered from court of original venue down to and through the Superior Court, Appellate Division, supplemented by final opinion and decision of our highest tribunal, i.e. Supreme Court of New Jersey sets out clearly and in great detail its basis for said opinions and decisions separately and independently determined.

There is No Conflict of Decision

The aforementioned three New Jersey Court decisions and separate opinions rendered with each, makes it apparent why questions need not be continued or labored.

There is No Important Question of Federal Law

The petitioner failed in all his arguments to sustain and carry out duty and proofs of belabored allegation of any violations of State and likewise of United States Constitution, which would entitle petitioner to allowance of writ herein sought.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THEODORE RABINOWITZ,
Counsel for Respondents,
Lester Lamont and Marion Lamont, his wife.

Dated: May 4th, 1954

Office - Supreme Court,
FILED
MAY 5 1954
HAROLD B. WILLEY, C

3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 637.

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF OF DEFENDANT BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, NEW JERSEY.

ROBERT H. DOHERTY,
Attorney for the Defendant Board of Education of the City of Jersey City, New Jersey,
586 Newark Avenue,
Jersey City, N. J.

CITATIONS.

	PAGE
UNITED STATES CONSTITUTION:	
Article 14, Sec. 1, Amendments	1, 3, 6
UNITED STATES COURT:	
Southern Power Co. vs. *North Carolina Public Service,* 263 U. S. 508	5
NEW JERSEY STATE CONSTITUTION:	
Constitution State of New Jersey 1844 Art. 1, Paragraph 16	4, 5
NEW JERSEY COURTS:	
Valentine vs. *Lamont,* 20 N. J. Super. 454	2
REVISED STATUTES OF NEW JERSEY:	
Eminent Domain Act (Rev. of 1900) (now R. S. 20:1-1 *et seq.*)	2
R. S. 18:5-25	3
R. S. 18:5-26	3
U. S. SUPREME COURT RULES:	
Rule No. 38	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 637.

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF OF DEFENDANT BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, NEW JERSEY.

I.

Answers to question raised in petition.

1. We deny that the judgment of the Supreme Court of New Jersey, unexpectedly overruled all previous applicable decisions of courts in that State.

2. We deny that the judgment of the Supreme Court of New Jersey deprived petitioner of property without due Process of Law and contravened Art. 14, Sec. 1 of the Amendment to the Constitution of the United States.

II.

Summary and statement of matters involved.

The basic question for determination is the nature of the title acquired by the Board of Education of the City of Jersey City when it condemned the property in question for school purposes in 1922. The Law Division in the trial court held that the board had acquired a fee simple absolute from plaintiff's ancestor, 20 N. J. Super. 454 (1952).

On July 19, 1922 the Board of Education of Jersey City instituted condemnation proceedings pursuant to L. 1903 (2d sp. sess.) c. 1, sec. 47, as amended by L. 1922, c. 226, sec. 1 (now R. S. 18:6-24), and in conformity with the Eminent Domain Act (Revision of 1900) now (R. S. 20:1-1 *et seq.*), to acquire title to 15 Dick Street, Jersey City, and other adjacent properties, for the purpose of enlarging No. 11 School (R. 1, 2). Emma Maslin was the owner of 15 Dick Street, a one-family frame dwelling which still stands. Commissioners in condemnation were appointed and fixed the value of the Maslin property at $13,600 (R. 59). After a hearing duly held, the commissioners' report was confirmed and the board of education paid Mrs. Maslin $13,600 as the fair market value for her property. She took no appeal.

The properties needed for enlarging the school were then occupied by monthly tenants. The Board continued to collect rentals through the years 1922 to 1945, paid real estate taxes and water charges to the City of Jersey City, and bore the expense of insurance, maintenance and repair of the properties. During that entire period of time the board assumed and exercised complete control and dominion of the properties.

In September 1945 the board of education adopted a resolution declaring that the various parcels acquired by condemnation were no longer needed for school purposes, and directed that they be sold at public sale under R. S. 18:5-25 and 26. The minimum sales price for 15 Dick Street was fixed at $5,900. Defendant Lester Lamont was the successful bidder at the public sale, having bid $5,900. On March 21, 1946 the board adopted a resolution ratifying the public sale. Thereafter, on April 9, 1946 the board executed and delivered a bargain and sale deed conveying the said premises to Lester Lamont and Marion, his wife, for $5,900.

At no time during the period from 1922 to 1946 did plaintiff or her predecessors in title ever dispute the possession or title of the board of education. The same is true as to plaintiffs' possession or title from April 9, 1946 to the institution of this action. It was not until the complaint was filed on January 11, 1952 that anyone made any claim that the board had acquired no greater estate than an easement or fee simple determinable in 15 Dick Street by virtue of the 1922 condemnation proceedings (R. 59, 60).

III.

There is no basis upon which this Court has jurisdiction to review the judgment in question.

We contend there is no substantial question involved in this application because the judgment of the New Jersey Supreme Court (R. 87) is not repugnant as alleged to the 14th Amendment to the United States Constitution.

We contend further, that there is no merit to the contention of petitioner that the federal question sought to be reviewed here, was first raised in the New Jersey Supreme

Court, when that court allegedly, unexpectedly overruled previous decisions of the New Jersey Supreme Court. (Petitioner's Brief 6 last par.) We deny the method of raising them was by a petition for rehearing in that court, because reference to petitioner's brief (R. 93) under the caption of alleged applicability of the 14th Amendment shows clearly that petitioner stated and we quote "The applicability of the due process of law clause of this amendment has been implicit in this case ever since its inception". As early as January 11, 1952 when petitioner's original suit was instituted (R. 61), the petitioner raised the constitutionality of the quality of the estate that might be acquired. This is referred to by Judge Goldman in his opinion in the Appellate Division (R. 73) when he declared "There was nothing in the Constitution of 1844 limiting the quality of the estate that might be so acquired in order to fully achieve a public use—as where such use might go on forever". Judge Smith in the trial court also refers to the constitutional question herein involved (R. 46). Judge Oliphant in speaking for the highest court in the State of New Jersey on the appeal to the New Jersey Supreme Court said (R. 80) "The appeal was taken to this court • • • on the ground that the legislature was never vested with power, under the Constitution (1844), Art. 1, par. 16, to enact laws to permit the acquisition of a fee simple absolute by eminent domain".

It cannot be successfully contended by petitioner that she has been deprived of her day in court and that judgment was entered against her without due process of law under the 14th Amendment in view of the foregoing. The petitioner raised this question in the trial court, in the Appellate Division, in the Supreme Court of New Jersey and again upon re-argument in the Supreme Court, in maintaining that this defendant never acquired a fee sim-

ple absolute title to the premises in question. The contention of the appellant in this case is both novel and fantastic. The claim is made (Petitioner's Brief 7) that the Supreme Court of New Jersey has decided a federal question of substance not heretofore determined by this court. If the petitioner's contention has any constitutional merit, then the clause in the New Jersey Constitution 1844, Art. 1, par. 16, (R. 63), that "Private property shall not be taken for public use without just compensation" is meaningless. In effect, this petitioner claims that in no circumstance may a condemnor acquire a fee simple absolute title in the State of New Jersey under the New Jersey Constitution (1844) and the enabling condemnation act. The petitioner refers repeatedly to the statement that the property of A private individual cannot be taken and given to a private individual B. This statement is repeated in petitioner's brief at page 8 three times, at page 9 bottom and page 23. Although this statement is not applicable to the facts here involved, we agree with the many statements of law that such a procedure would be unconstitutional. The petitioner's whole case is founded upon this false premise that the property of A a private individual was taken and given to B. We challenge the petitioner to point out any stipulation or evidence in the record in this case, where such testimony appears.

We contend further that the petitioner in this case has failed to comply with the provisions of Rule 38 of this court that "a supporting brief may be annexed to the petition or presented separately but *it must be direct* and concise. (Italics mine.) A failure to comply with these requirements will be sufficient reason for denying the petition."

This court has held in *Southern Power Co.* v. *North Carolina Public Service Co.* in 263 U. S. 508 that a petition

to the United States Supreme Court for a writ of certiorari should make a clear, definite and complete disclosure concerning the controversy, since it is impossible for the court critically to examine the record before ruling on the application and it must rely largely on preliminary papers.

At page 23, par. 5, in petitioner's brief, there is set forth a statement that there are special and important reasons for the allowance of the writ because of the doubt and uncertainty that now prevails concerning the questions presented by the petitioner. There never seems to have been any doubt in anyone's mind except in the minds of the petitioner and her counsel.

The many cases cited by the petitioner to sustain her contention that the petitioner did not have her day in court and that the judgment of the New Jersey Supreme Court was entered without due process of law in violation of the 14th Amendment to the United States Constitution have no application to the facts in the present case.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari herein should be denied.

ROBERT H. DOHERTY,
Attorney for Defendant Board of Education of the City of Jersey City, Hudson County, New Jersey,
586 Newark Avenue,
Jersey City, N. J.

4

IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 637

ALTA VALENTINE,

Petitioner,

vs.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

BRIEF FOR RESPONDENT ANTHONY LAMONT IN OPPOSITION TO PETITION FOR CERTIORARI

EDMUND S. JOHNSON,
Counsel for Respondent,
Anthony J. Lamont,
921 Bergen Avenue,
Jersey City, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-6511

TABLE OF CONTENTS

Cases Cited

	PAGE
Brinkerhoff v. Hill, 281 U. S. 673	6
Fiske v. Kansas, 274 U. S. 380	6
Hunt v. Summerill, 25 N. J. Misc. 498, 504	4
Missouri v. Gehner, 281 U. S. 313	6
O'Hara v. District of Columbia, 147 F. 2d 146 (U. S. Ct. of App., D. C., 1944), certiorari denied 325 U. S. 855 (1945)	1
Saunders v. Shaw, 244 U. S. 317	7
Superior Oil Co. v. Harsh, 39 Fed. Supp. 467 (District Court E. D. Illinois)	7
Wilkinson v. Leland, 2 Peters 627	7

New Jersey Statutes Cited

N.J.R.S. 18:5-25	2
N.J.R.S. 18:5-26	2

IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 637

ALTA VALENTINE,

Petitioner,

vs.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, a body corporate, *et al.*,

Respondents.

BRIEF FOR RESPONDENT ANTHONY LAMONT IN OPPOSITION TO PETITION FOR CERTIORARI

Practically the same issues attempted to be brought before this Court by the petitioner for certiorari were decided adversely to her contentions in the case of *O'Hara* v. *District of Columbia,* 147 F. 2d 146 (U. S. Ct. of App., D. C., 1944), certiorari denied 325 U. S. 855 (1945), where the Court stated that "In the absence of special circumstances it would be reasonable to presume that no estate less than absolute title is sufficient for school purposes."

Here, as in the *O'Hara* case, the petitioner for certiorari claims a reverter; there, as here, the United States Court of Appeals for the District of Columbia held that the estate acquired by the District of Columbia for school purposes was a fee simple absolute and that title did not revert back to the original owners because of non-use by the District for school purposes. In the case at bar the three New Jersey Courts which decided the case at bar, held, unanimously, that the estate acquired by the Board of Education of Jersey City, a body corporate, was a fee simple

absolute, and that when it decided that the property so acquired by condemnation for school purposes was no longer needed for the same, it was authorized to and did give a title in fee simple absolute in 1946 to Lester Lamont and his wife, the purchasers at a public sale of said premises, made pursuant to the statute permitting the sale of unneeded public school property.

Inasmuch as the petitioner has not seen fit to set forth the facts in the instant case as she should have done to give this Court a clear-cut picture of the real issues, I shall state them:

In July 1922, the Board of Education of Jersey City, New Jersey, a body politic of the State of New Jersey, endowed by law with the power of eminent domain, filed its suit to condemn the lands of Emma Maslin, situate at 15 Dick Street, Jersey City, New Jersey, contiguous to Public School No. 11, for the enlargement of that school. Mrs. Maslin was served with summons and complaint. The Court appointed condemnation commissioners (R. 2-1 to 10). The latter commissioners awarded the owner, Mrs. Maslin, $13,600.00 for her property, a one-family frame house containing 6 rooms and bath on an ordinary city lot. She neither contested nor questioned the suit to condemn her lands nor the award made by the Commissioners. The Board of Education, pursuant to said award, paid, and Mrs. Maslin accepted, $13,600.00, as the full value of her lands (R. 32-20).

On September 6, 1945, the said Board of Education adopted a resolution declaring that the premises in question was no longer needed for school purposes and ordering a public sale thereof, pursuant to New Jersey Revised Statutes 18:5-25 and 18:5-26.

On March 14, 1946, a public sale was had and the property in question sold to the highest bidder, Lester Lamont and wife, for $5,900.00. The latter went into possession thereof immediately following delivery of the Board's deed, bearing date April 9, 1946. The petitioner herein

never complained until January 11, 1952, when she filed her action in ejectment. Neither petitioner's ancestor, Mrs. Maslin, nor Mary L. Stinard, petitioner's mother, ever questioned the proceedings or the title during their lifetime. Mrs. Maslin died in 1928 and Mrs. Stinard in 1934 (R. 5-1 to 10).

In her complaint in the law action the petitioner admitted that the Board of Education had the power to condemn and acquire the said land for school purposes (R. 2-10).

Neither Mrs. Maslin, nor her daughter, Mrs. Stinard, nor the petitioner herein, ever questioned the bona fides of the condemnation proceedings. As Judge GOLDMANN, speaking for the Appellate Division of the Superior Court of New Jersey, observed (R. 74-10):

> "There is no suggestion here that the acquisition of the property in question was made *mala fides*. There is no taint of fraud or of a concealed purpose by the board to negative the *bona fides* of the acquisition. Nor is there anything to indicate that the board, in determining that the premises were no longer needed for school purposes, was actuated by any consideration other than what was in the best public interest."

Yet the petitioner seems to infer (P. 8, Petition) that in some surreptitious way these lands were taken in 1922 (over 30 years ago) from "A", without her consent (Mrs. Maslin never questioned the condemnation proceedings nor the award of $13,600.00 which she pocketed), and given to "B" in 1946, 24 years later.

The only issue in this case was: What was the quality of the estate in the said lands acquired by the Board of Education of Jersey City, through its condemnation proceedings? The trial Court—Superior Court of New Jersey, held that the Board of Education acquired a fee simple absolute (R. 57-10). On appeal to the Appellate Division of the Superior Court of New Jersey, Judge GOLDMANN in

affirming the judgment of the trial Court said (R. 75-10 to 20), speaking for a unanimous court:

> "We hold, therefore, that the Board of Education of Jersey City acquired a fee simple absolute in the Maslin premises as a result of the 1922 condemnation and that no reverter resulted from the determination of the board to dispose of the property in 1945 or from the sale and conveyance to the defendants Lamont which ensued."

The Supreme Court of New Jersey (R. 78) affirmed the trial Court and the Appellate Division of the Superior Court. The highest court expressly overruled the obiter dicta of Judge PROCTOR in *Hunt* v. *Summerill,* 25 N. J. Misc. 498, 504, on which petitioner has laid unwarranted stress. The Supreme Court, in deciding the appeal, expressly held that a fee simple absolute could be acquired through condemnation proceedings in New Jersey, and that a fee simple absolute was taken by the Board of Education in the premises in question; that it acted in conformance with the statutory requirements for the sale of property no longer needed for public school purposes, and was authorized by the said statutes to convey a fee simple absolute title on the completion of the sale held pursuant to the statutes.

The petitioner claims she has been deprived of due process of law. How? Certainly not in the primary sense. The proceedings in condemnation were regular in every sense. Petitioner's grandmother, Emma Maslin, through whom she claims, was made a party to the condemnation proceedings (R. 2-5). Commissioners were appointed who appraised the full value of her property at $13,600.00, which was paid by the Board and accepted by her. She did not contest the proceedings or the award. She and her daughter, Mrs. Stinard, died some years later and neither in their lifetime attacked the proceedings or the award, or the title. The petitioner, a resident of New Jersey, made no attempt when the property was put up for sale at public auction by the Board to question the proceedings, al-

though it was publicly advertised, but allowed the respondents, Lester Lamont and his wife, the purchasers at the public sale, to complete their contract, pay the purchase price and incur whatever expense was necessary to put the premises in livable condition. Her suit smacks of an afterthought.

The petitioner has had a full trial of her case and enjoyed two appeals, and because all have been decided adversely to her she imposes on this Court her spurious claim that the issues present a Federal question under the Fourteenth Amendment, without "particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question." Rule 38, par. 2.

The petitioner is wrong when she says on pages 12 and 13 of her petition that *Hunt* v. *Summerill* and *Frelinghuysen* v. *State Highway Commission* were the recognized law in the State—we presume she means as bearing on the facts in the instant case—until the decision in the case at bar. We disagree and so have all three courts who heard this case. The *Summerill* case was a traction case and the *Frelinghuysen* case was a highway case. The Courts in deciding the case at bar distinguished these cases therefrom and held they had no application.

All three of the New Jersey Courts held unequivocally in the case at bar, that there was nothing in the Constitution of the State of New Jersey which prohibited the Board of Education of Jersey City from acquiring lands by condemnation in fee simple absolute, the only requirement being that just compensation be paid for the lands so taken, which was done. And that the Board could sell and dispose of any lands so acquired, at public sale, when it found that the said lands were no longer needed for school purposes.

The United State Supreme Court cases cited by petitioner have no pertinence to the issues in the case at bar.

In *Brinkerhoff* v. *Hill,* 281 U. S. 673, cited by petitioner, the Court found that the plaintiff had never been accorded "due process of law—using the term in its primary sense of an opportunity to be heard and defend its substantive right." In the case at bar, the petitioner has been accorded three hearings: Before the trial branch of the Superior Court; an appeal to its Appellate Division, and another appeal to the Court of last resort—the Supreme Court of New Jersey. One would think that her appetite for litigation might have been fully and amply satisfied by these three hearings. The writer almost hears the much-maligned Fourteenth Amendment crying out against the petitioner's attempt to seek refuge under its wings.

Mr. Justice BRANDEIS in the *Brinkerhoff* case makes the very pertinent observation, at page 680, concerning this Court's policy on the review of decisions of state courts.

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

Fiske v. *Kansas,* 274 U. S. 380, concerned the interpretation of a State criminal statute—the Kansas Criminal Syndicalism Act. No relevance here.

Missouri v. *Gehner,* 281 U. S. 313, was a tax case where, seemingly, the value of appellant's government bonds was not disregarded in making up the estimate of taxable net values. The Court held it to be in violation of the established rule. No relevance to the case at bar, except the following observation:

At page 320, Justice BUTLER said:

> "It is well settled that this Court will not consider questions that were not properly presented for decision in the highest Court of the State. Ordinarily, it will not consider contentions first made in a petition for rehearing where the petition is denied without more. Citing *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106."

In *Saunders* v. *Shaw,* 244 U. S. 317, cited by petitioner, certiorari was granted to review a judgment of the trial Court predicated upon testimony originally ruled by it to be immaterial, concerning which the party offended against had no occasion and proper opportunity to introduce his evidence. Not relevant to the case at bar because petitioner has had every opportunity to present her case.

Wilkinson v. *Leland,* 2 Peters 627, has absolutely no relevance to this case.

The case of *Superior Oil Co.* v. *Harsh,* 39 Fed. Supp. 467 (District Court E. D. Illinois) cited by petitioner, was an injunction suit to enjoin the operation of an oil well upon a schoolhouse site where the title to the lands was questioned and the case involves construction of a lost "deed", the question of adverse possession, and a rather strained interpretation of the eminent domain statute of Illinois, and, also, whether the grant in question was by deed to the school directors "who in Illinois have no title to school property." In the case at bar the Board of Education, a body politic, enjoying the right of eminent domain, took title as a body corporate as the result of condemnation proceedings. The facts and law in the instant case are entirely different from the cited case.

This respondent respectfully submits that the petition for writ of certiorari is without substance, and should be denied.

Respectfully submitted,

EDMUND S. JOHNSON,
Counsel for Respondent, Anthony J. Lamont.

Office - Supreme Court, U. S.
FILED
MAY 12 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 637.

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION of the CITY OF JERSEY CITY, Hudson County, a body corporate, *et al.*,

Respondents.

REPLY BRIEF OF PLAINTIFF TO BRIEFS OF RESPONDENTS.

LOUIS G. MORTEN,
Attorney for Petitioner,
26 Journal Square,
Jersey City, N. J.

SUBJECT INDEX OF MATTERS IN REPLY BRIEF.

	PAGE
1. Reply to Brief of Respondents, Lester Lamont, *et ux*	1
2. Reply to Brief of Respondent, Board of Education	3
3. Reply to Brief of Respondent, Anthony Lamont	7

CASE CITED.

O'Hara v. *Dist. of Columbia*, 147 Fed. 2d, 146	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 637.

ALTA VALENTINE,

Petitioner,

v.

LESTER LAMONT and MARION LAMONT, his wife, BOARD OF EDUCATION of the CITY OF JERSEY CITY, Hudson County, a body corporate, *et al.*,

Respondents.

Reply to Brief of Respondents, Lester Lamont and wife.

An examination of the brief of counsel for the respondents, Lester Lamont and wife discloses that he makes no attempt to answer the matters set forth in petitioner's brief and the argument presented thereon.

Under Point One he argues that the New Jersey Statutes contain no reference as to the limitation of the fee taken therein and thereunder.

Under Point Two he argues that a fee simple absolute can be acquired by eminent domain.

Under Point Three he argues that a judgment in favor of the plaintiff (petitioner) would violate the 5th Amendment of the U. S. Constitution.

All of this argument has no bearing whatever upon the question as to whether or not this court should grant

its writ of certiorari to review the judgment of the New Jersey Supreme Court to determine whether there has been a denial of the rights guaranteed under the 14th Amendment.

And finally he concludes with his own statement that the State Court decisions in this case are correct; that there is no conflict of decision; and that there is no important question of Federal law which would entitle petitioner to allowance of writ herein sought.

Counsel has not understood or he decided to ignore all of the points made by petitioner and the authorities cited in support thereof.

Therefore, there is nothing in his brief that requires any further reply thereto by the petitioner.

Reply to Brief of Respondent, Board of Education.

An examination of the brief of counsel for the respondent, Board of Education discloses that he makes no attempt to answer the matters set forth in petitioner's brief and the argument presented thereon.

Under I he merely makes certain denials but he does not point out in any way how or wherein the argument of Petitioner under Point I of her supporting brief (p. 11 etc.), is in any way erroneous nor does he claim that the cases cited by petitioner do not support the argument advanced.

Neither does he cite any authorities holding contrary to the cases cited by the plaintiff.

Under II he gives a summary of facts but no facts that dispute and no argument that refutes the claim under II of petitioner's brief that this court has not heretofore determined whether or not title in fee simple absolute can be acquired by eminent domain proceedings.

Under III he makes certain contentions but nothing therein contained is addressed or a reply to Point III of petitioner's brief, under which she claims that this court has not heretofore determined whether or not, where the estate to be taken under eminent domain proceedings is not expressly defined and an easement is sufficient for the purpose, no greater estate can be taken.

He contends that the federal question sought to be reviewed was not first raised in the New Jersey Supreme Court by the petition for re-hearing and quotes from petitioner's brief in that court, the statement by petitioner that the federal question has been implicit in this case since its inception, to support his contention.

Implicit and raised are by no means synonymous.

Implicit is defined as "Fairly to be understood though not specifically stated;" (Standard Dictionary 1929, p. 1235).

In January, 1952 when petitioner's original suit was instituted, the only constitutional question raised was based on the New Jersey Constitution (R. 4).

The statement in the brief on petition for rehearing (R. 93) that the applicability of the due process clause of the 14th Amendment has been implicit and can only mean that it has always been in the case though not actually raised until presented on the petition for rehearing.

The brief expressly states that previous to the filing of the petition for re-hearing it was not believed to be necessary to raise or discuss this question.

And this was because of the decision in the *Frelinghuysen* case (R. 92).

So that the statement that a question is implicit negatives the thought that it has been presented rather than supports it.

And this is true because petitioner then believed that it was not necessary to raise this question in view of the previous decisions in the New Jersey courts.

An examination of the reference by counsel on page 4 of his brief to R. 73 discloses that this reference is not to the Federal Constitution nor any federal question.

It is a reference to the New Jersey Constitution only.

He next states that it cannot be successfully contended that petitioner has been deprived of her day in court and that judgment was entered against her without due process of law.

However, his references to the record do not support his statement and no reference to any authorities is cited.

Nor does he state in his brief how or when the federal question was raised by petitioner or decided by the court.

There never was any such issue raised by the pleadings or otherwise.

He next argues that if the defendant (board) never acquired a fee simple absolute to the premises in question, then the clause in the New Jersey Constitution, "Private property shall not be taken for public use without just compensation" is meaningless.

However, on page 5 of his brief he admits that if the private property of A were taken and given to B, "such a procedure would be unconstitutional."

But he says that it "is not applicable to the facts here involved."

He apparently has overlooked the argument on page 20 of petitioner's brief.

If the State of New Jersey could not itself pass an act transferring the private property of A to B, then how can it authorize a condemnor to transfer to B the private property acquired from A by condemnation?

And it must be conceded that if the Board in this case acquired a fee simple absolute title to the condemnee's private property, the Board could thereafter, at any time, convey such title at will.

The result is the same whether the State passes an act taking the private property of A and giving it to B or authorizes a condemnor to do so.

And to meet the Board's challenge to point out in the record the evidence to support the premise that in this case the private property of the condemnee was taken by the Board as condemnor and later conveyed to the respondents Lester Lamont and wife, private citizens, petitioner refers to Petitioner's brief pages 3 and 4 and the references to the record cited to support the statements, none of which have been denied by anyone.

He next contends that petitioner's brief does not comply with Rule 38 of this court.

This contention is so vague and indefinite that it seems to permit of no other answer than to assert that it does comply with such rule.

He next states there is no doubt or uncertainty concerning the questions presented by the petitioner.

How does he reconcile the decisions both Federal and State cited by petitioner with the decision by the New Jersey Supreme Court in this case, and particularly those cases cited under III of petitioner's brief?

It is, therefore, respectfully submitted that there is nothing in this brief that meets or overcomes the argument of the petitioner in her supporting brief upon the questions raised.

Reply to Brief of Respondent Anthony Lamont.

An examination of the brief of counsel respondent, Anthony Lamont discloses that he likewise makes no attempt to answer the matters set forth in petitioner's brief as to the merits of her application for a writ of certiorari.

He cites the case of *O'Hara* v. *Dist. of Columbia,* 147 Fed. 2d, 146.

In that case the Statute provided:

> "Title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in the declaration shall vest in the District of Columbia."

The declaration did not specify what estate was to be taken. The court held that under the circumstances an estate in fee simple absolute was intended and the statute was controlling.

The language in the opinion that "In the absence of special circumstances it would be reasonable to presume that no estate less than absolute title is sufficient for school purposes," has no judicial value, as a precedent.

This determination was not necessary in view of the holding of the court.

It does not appear that this question was raised, argued or decided.

It was merely a voluntary presumption at the best.

Therefore, it was entirely obiter.

In addition no constitutional question, federal or state, was raised or decided in that case.

Therefore, it is no authority upon the question as to whether or not a fee simple absolute title can be acquired to property intended for school use, without violating the 14th Amendment to the Federal Constitution.

Neither did the decisions of the New Jersey Courts in this case consider or decide this question.

He then states on page 2 of his brief that petitioner has not set forth facts to give this court a clear-cut picture of the real issues and that he will do so.

He admits on page 3 of his brief that the only issue was:

> "What was the quality of the estate in the said lands acquired by the Board of Education of Jersey City through its condemnation proceedings?"

It is respectfully submitted that every fact essential in this case to the determination of this issue was included in the Summary found on pages 3, 4, and 5 of petitioner's petition and brief.

And none of the facts essential to such determination, appearing in counsel's statement and so essential, have been omitted by petitioner.

He then proceeds on pages 3, 4 and 5 of his brief to uphold the judgment of the New Jersey Court by citing the decisions of that court and the holding of the trial court and Appellate Decision in this case, all three of which held that the Constitution of New Jersey did not prohibit the acquiring of lands by condemnation in fee simple absolute if just compensation be paid.

But in none of these courts was the "due process of law" clause discussed or decided and even if it had been it must be conceded that none of these courts is the final arbiter upon a question arising under the federal constitution.

He states on page 5 of his brief that the *Summerill* and *Frelinghuysen* cases were not the recognized law in New Jersey as bearing on the instant case because the first case was a traction case and the second a Highway case.

It is not true, as he states, that the New Jersey Supreme Court distinguished these two cases from the case at bar and held they had no application.

In this case the Supreme Court stated that under our Statute when the State took the land for highway purposes it acquired an easement for public travel only, for it was manifest that the power was to take so much of the title as was essential to the use of public travel (R. 83), citing the *Frelinghuysen* case, but it did not point out any distinction indicating why it was necessary to acquire a fee simple absolute title in case of a school and not necessary in the case of a highway.

In the *Summerill* case there was no attempt made to distinguish that case from the present case. The holding in the *Summerill* case was not distinguished but was expressly overruled.

He states on page 5 of his brief that the cases in this court cited by the petitioner have no pertinence to the issues in the case at bar.

And he states on page 6 of his brief that the petitioner has been accorded three hearings but he wholly ignores the fact that in the first two of these hearings the "due process clause" was not presented, heard, considered or decided; nor was it presented, considered or decided in the Supreme Court on the first argument in that court on which the opinion was written upon which the judgment was based.

It was not until the petition for re-hearing was presented that it was first argued, but even though heard no opinion was expressed thereon and the result was a mere denial of the petition.

And he must concede that there was at least one, and perhaps more hearings, in the *Brinkerhoff* case before it came to this court.

On page 3 of his brief he concedes that there was an issue as to the quality of the estate acquired by the Board through its condemnation proceedings. Nowhere does he claim that this court has ever passed upon this question, construed with the "due process clause" of the Federal Constitution in mind.

The quotation on page 6 of his brief, from the opinion of Justice Brandeis is direct authority for the argument of the petitioner that this court may review decisions of state courts on federal questions, and he cannot deny that the effect of the "due process clause" on title to lands acquired by Eminent Domain proceedings is a federal question that has never been decided by this court.

His statement on the same page, that the *Fiske* case involved the interpretation of a State criminal statute and has no relevance here is proof that he has either not read or he has not understood the reasoning in this case quoted on page 17 of petitioner's supporting brief.

Dismissing the *Gehner* case with the words no relevance shows that counsel has again either wilfully ignored an argument advanced by petitioner or failed to understand it.

On page 7 of his brief he quotes from the same page of the opinion in this case as the petitioner but he makes no reference to the quotations found on pages 14 and 15 of petitioner's supporting brief and the argument of petitioner based thereon.

He apparently has not understood the purpose of these quotations or it may be that he was not able to refute the soundness of the argument of petitioner.

He dismisses the *Saunders* case on page 7 of his brief with the words not relevant because petitioner has had every opportunity to present her case.

But he makes no attempt and has utterly failed to show that the circumstances cited in that case, as sufficient

to move this court to review the judgment of a state court, are not all present in the case at bar.

He says she had every opportunity to present her case but makes no reply to the argument on page 14 of petitioner's supporting brief that she was not bound to anticipate an adverse holding or in advance to invoke Federal protection.

He dismisses the *Wilkinson* case on page 7 with the words no relevance.

However, here again, he fails to realize the relevance of the quotation on page 19 and argument on page 20 of petitioner's supporting brief or has chosen to ignore it.

He discusses the *Harsh* case on page 7 of his brief.

He states the construction of a lost "deed", adverse possession and a strained interpretation of the eminent domain statute were involved.

This is not true.

The defendants claimed title to oil and gas lease by virtue of

(1) a deed then lost;

(2) ancient grant;

(3) adverse possession.

and a later lease executed by the school trustees.

The court found that the alleged lost deed had not been proved; that ancient grant had not been proved; and that there was no adverse possession.

The case turned on whether the school trustees could execute a lease based on their title, which "title, in its inception was the title obtainable by Eminent Domain."

The court held that the trustees did not obtain a title under which their lease was valid and that all they acquired was an easement for school purposes.

However, he failed to discuss the *Miller* case, cited on page 21 of petitioner's brief.

The purpose in citing the *Harsh* case and the *Miller* case was to show that both Federal and State Courts have held that where the estate to be taken is not defined and an easement is sufficient for the purpose, no greater estate can be taken.

The respondents have not challenged this principle or cited any case, or any authority with supporting decisions, that is contrary, except the case now under consideration.

It cannot be successfully denied that a construction of the "due process clause" is finally within the sole jurisdiction of this court.

Therefore, it is respectfully submitted that a writ of certiorari should be granted in this case.

Respectfully submitted,

Louis G. Morten,
Counsel for petitioner.